

OPERATING AFTER SUSPENSION OR REVOCATION OF LICENSE

G.L. c. 90, § 23

I. OPERATING AFTER SUSPENSION OR REVOCATION OF LICENSE
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The defendant is charged with having operated a motor vehicle after his (her) (driver's license) (right to drive in Massachusetts) had been (suspended) (revoked).

In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: That the defendant operated a motor vehicle;

Second: That at the time the defendant was operating a motor vehicle his (her) (driver's license) (right to drive in Massachusetts) had been (suspended) (revoked); and

Third: That the defendant

If relevant to evidence.

or an agent of the defendant, such as a household member or employer

had received notice that his (her) (driver's license) (right to drive in Massachusetts) had been or was about to be (suspended) (revoked).

See Instruction 3.200 (Operation of a Motor Vehicle).

**II. OPERATING AFTER SUSPENSION OR REVOCATION OF LICENSE
BECAUSE OF CERTAIN ALCOHOL-RELATED OFFENSES**
(G.L. c. 90, § 23, second par.)

The defendant is charged with having operated a motor vehicle after his (her) right to operate in Massachusetts had been (suspended) (revoked) (because of a violation of Section 24[1][a]) (pursuant to section 24D) (pursuant to section 24E) (pursuant to section 24G) (pursuant to section 24L) (pursuant to section 24N) of chapter 90 of our General Laws.

In order to prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

First: That the defendant operated a motor vehicle;

Second: That at the time the defendant was operating a motor vehicle his (her) right to operate in Massachusetts had been revoked;

Third: That the defendant's right to operate was suspended or revoked pursuant to (a violation of section 24[1][a]) (section 24D) (section 24E) (section 24G) (section 24L) (section 24N) of chapter 90 of our General Laws; and

Fourth: That the defendant

If relevant to evidence.

or an agent of the defendant, such as a household member or employer

had received notice that his (her) right to operate in Massachusetts had been or was about to be (suspended) (revoked).

Commonwealth v. Groden, 26 Mass. App. Ct. 1024, 533 N.E.2d 1027 (1989)
(statute does not violate ex post facto clause).

See Instruction 3.200 (Operation of a Motor Vehicle).

SUPPLEMENTAL INSTRUCTIONS

1. *Proof of RMV-initiated suspension or revocation.*

The Commonwealth

is required to prove beyond a reasonable doubt that the defendant, or some agent of the defendant's such as a household member or employer, received notice from the Registrar of Motor Vehicles that the defendant's license or right to drive had been, or was about to be, suspended. The Commonwealth is not required to prove that the defendant had actual, personal knowledge of the contents of the notice.

You may consider a properly attested copy of the official records of the Registry of Motor Vehicles as sufficient evidence that the defendant's (license) (right to operate a motor vehicle) was (suspended) (revoked). You are not required to accept it as sufficient evidence, but you may.

2. Proof of notice of suspension or revocation from RMV business record.

You

may consider a properly attested copy of a business record of the Registry of Motor Vehicles as sufficient evidence that the Registrar properly notified the defendant of the (suspension) (revocation) of the defendant's right to operate a motor vehicle. You are not required to accept it as sufficient evidence, but you may.

The judge must first determine that the record is admissible as a business record and that it does not violate the confrontation clause. See *Commonwealth v. Parenteau*, 460 Mass. 1, 948 N.E.2d 883 (2011).

See Instruction 3.840 on Admissibility of Business Records.

Upon the suspension or revocation of a license or right to operate, the Registrar is required to send written notice to the driver's last address as appearing on Registry records, or to his last and usual residence. G.L. c. 90, § 22(d).

The Commonwealth must prove receipt either of notice of actual suspension or notice of intent to suspend, *Commonwealth v. Crosscup*, 369 Mass. 228, 231 & n.2, 339 N.E.2d 731, 734 & n.2 (1975), and the defendant must be permitted to offer evidence of nonreceipt, *Id.*, 369 Mass. at 240, 339 N.E.2d at 739. "Receipt" includes receipt by a household member, employer or other agent of the defendant; the Commonwealth is not required to prove actual personal knowledge on the defendant's part. *Id.*, 369 Mass. at 231, 236, 239, 339 N.E.2d at 733-734, 736, 738.

The Registrar's proper mailing of a letter is prima facie evidence of receipt by the addressee. *Id.*, 369 Mass. at 239-240, 339 N.E.2d at 738-739. See the notes to Instruction 3.260 (Prima Facie Evidence).

One who willfully evades notice may be deemed to have received constructive notice. *Commonwealth v. Hampton*, 26 Mass. App. Ct. 938, 525 N.E.2d 1341 (1988). However, see *Police Commissioner of Boston v. Robinson*, 47 Mass. App. Ct. 767, 774, 716 N.E.2d 652, 658 (1999) (fact that certified letter was unclaimed, absent evidence of awareness and ability to claim it or evidence of wilful disregard of it, does not warrant conclusion that defendant received constructive notice of license revocation).

3. Proof of court-initiated suspension or revocation.**The Commonwealth**

is required to prove beyond a reasonable doubt that the defendant received notice that his (her) right to operate had been (suspended) (revoked).

You may, but are not required to, consider a properly attested copy of the official records of a court as sufficient evidence that the defendant's license was suspended, and that the Court properly notified the defendant of the (suspension) (revocation) of the defendant's right to operate a motor vehicle.

In some cases, suspension or revocation is initiated not by the Registrar but by the court or by operation of law. See, e.g., G.L. c. 90, §§ 24(1)(b) ("conviction of [O.U.I.] shall revoke the license or right to operate of the person so convicted" unless defendant is given a § 24D disposition), G.L. c. 90, § 24D (as part of a § 24D disposition, "the person's license or right to operate shall be suspended" by judge for specified duration), and G.L. c. 90, § 24N (where defendant being arraigned has breathalyzer reading of .08% or higher or has refused breath or blood testing and police failed to suspend or take license at time of stop, judge "shall immediately suspend the defendant's license or right to operate").

In such cases, notice of suspension or revocation may be proved by the Registrar's subsequent letter, as above. It appears that notice could also be shown by a docket entry, clerk-magistrate's certificate (see below), or testimony establishing that the defendant was notified by the court that the suspension or revocation was effective immediately. See *Commonwealth v. Sherri L. Dotson*, 33 Mass. App. Ct. 1101, 595 N.E.2d 812 (No. 90-P-1418, July 14, 1992) (unpublished decision under Appeals Court Rule 1:28) (where judge took notice that he always notifies defendant in open court that license is now suspended under G.L. c. 90, § 24D, "counsel did not contest that this had occurred, but asserted that the statute additionally required proof of written notice to the defendant from the court or the Registrar of Motor Vehicles. The defendant has cited no authority for that proposition when, as here, actual knowledge of the suspension is established.")

OPERATING AFTER SUSPENSION OR REVOCATION OF LICENSE

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NOTES:

1. **Operating after suspension for OUI-related offense does not require bifurcated trial.** The aggravated charge of operating after suspension or revocation because of an OUI-related offense (G.L. c. 90, § 23, second par.) does not require a bifurcated trial under G.L. c. 278, § 11A (which requires a bifurcated trial when a defendant is charged with a second or subsequent offense with a more severe penalty). *Commonwealth v. Blake*, 52 Mass. App. Ct. 526, 755 N.E.2d 290 (2001).

2. **Registrar's certificate of suspended or revoked status.** "A certificate of the registrar or his authorized agent that a license or right to operate motor vehicles . . . has not been restored or that the registrar has not issued a new license so to operate to the defendant . . . shall be admissible as evidence in any court of the commonwealth to prove the facts certified to therein, in any prosecution hereunder wherein such facts are material." G.L. c. 90, § 23, third par. However, a certification by the registrar that an attached notice of suspension was "mailed on the date(s) appearing on the notice to the last address on file" is not admissible to prove notice as it goes beyond attesting to the authenticity of the record and is thus testimonial. *Commonwealth v. Parenteau*, 460 Mass. 1, 948 N.E.2d 883 (2011).

3. **RMV records require attestation.** Under G.L. c. 90, § 30, G.L. c. 233, § 76 and Mass. R. Crim. P. 40(a)(1), copies of official records of the Registry of Motor Vehicles are admissible in evidence only if they are attested by the Registrar or his agent, i.e., a written and signed certification that it is a true copy. A photocopy of the attestation does not satisfy this requirement. *Commonwealth v. Deramo*, 436 Mass. 40, 48, 762 N.E.2d 815, 821 (2002) (photocopy of attestation insufficient). The attesting signature may be either holographic, stamped or printed. See the notes to Instruction 2.540 (Subsequent Offense).

4. **Defendant's failure to report address change to RMV.** General Laws c. 90, § 26A requires a licensed operator to notify the Registry of any change of residential or mailing address within thirty days. Query what effect a failure to do so has on the notice requirement in a prosecution under § 23. Compare *Commonwealth v. Hampton*, 26 Mass. App. Ct. 938, 940, 525 N.E.2d 1341, 1342-1343 (1988) (in firearms prosecution where absence of license not an element of the offense, defendant herself was responsible for nonreceipt of license suspension notice, by failing to report change of address as required by statute).

5. **Clerk-magistrate's certificate of suspended status.** "A certificate of a clerk of court that a person's license or right to operate a motor vehicle was suspended for a specified period shall be admissible as prima facie evidence in any court of the commonwealth to prove the facts certified to therein in any prosecution commenced under this section." G.L. c. 90, § 23, third par.

6. **Public way not an element.** This offense does not require that the violation occur on a public way. *Commonwealth v. Murphy*, 409 Mass. 665, 568 N.E.2d 1143 (1991).

7. **Hardship license violation.** A defendant who operates a motor vehicle outside the hours of operation permitted by a hardship license issued after a license suspension cannot be charged with operating after suspension, G.L. c. 90, § 23, since that offense is defined as operation prior to the Registry's "issuance to him of a new license to operate." The appropriate charge is operating a motor vehicle without a license, G.L. c. 90, § 10. *Commonwealth v. Murphy*, 68 Mass. App. Ct. 152, 154-155, 860 N.E.2d 961, 963 (2007).

8. **Evidence of notice to defendant.** A business record that the suspension or revocation notice was mailed to the defendant on a given date, created by the Registry at the time the suspension or revocation notice was mailed to the defendant, is admissible at trial on the issue of the defendant's receipt of the notice. If the Registry later creates an attested record of the mailing for the purpose of trial, that record does not meet the requirements of the business records exception and is inadmissible as testimonial hearsay. G.L. c. 233, § 78; *Commonwealth v. Parenteau*, 460 Mass. 1, 948 N.E.2d 883 (2011), citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527 (2009), and *Commonwealth v. Trapp*, 396 Mass. 202, 208, 485 N.E.2d 162 (1985), S.C. 423 Mass. 356, 668 N.E.2d 327, cert. denied, 519 U.S. 1045, 117 S.Ct. 618 (1996).